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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

OCTOBER TERM, 1991

PETER VARIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented For Review

1. Whether Title 18 U.S.C. § 2518 (8) (a) required the government to provide satisfactory explanations for delays in resealing an electronic surveillance tape admitted into evidence at petitioner's trial and, if so, whether the government's explanations to the district court for the delays were satisfactory.

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October Term, 1991

PETER VARIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Peter Vario respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on September 3, 1991.

Opinions Below

A copy of the opinion of the United States Court of Appeals for the Second Circuit, United States v. Vario, 943 F.2d 236 (2d Cir. 1991), is annexed, in slip opinion form, in the Appendix hereto at pages 1a - 17a. A copy of the order of the Second Circuit Court of Appeals which denied the petition for a rehearing containing a suggestion for rehearing en banc appears in the Appendix at pages 18a - 20a.

Statement of Jurisdiction

The judgment of conviction, dated June 26, 1990, was entered on June 27, 1990. The decision of the United States Court of Appeals for the Second Circuit affirming the conviction was entered on September 3, 1991. On October 18, 1991 the order of the Court of Appeals denying

the petition for rehearing en banc was entered. The jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. § 1254 (1).

Statutory Provisions

Title 18 U.S.C. § 2518 (8)(a) set forth in the Appendix (21a - 22a).

Statement of the Case

Peter Vario, the petitioner, was convicted following a jury trial in the United States District Court for the Eastern District of New York before the Honorable Jacob Mishler.[1] Petitioner was named with three other defendants in a 57-count indictment. Petitioner's codefendants pled guilty prior to trial.

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[1] The District Court had subject-matter jurisdiction over this case pursuant to Title 18 U.S.C. § 3231.

Petitioner was convicted of racketeering conspiracy, in violation of Title 18 U.S.C. §§ 1961, 1962 (d) and 1963 (a); and thirteen counts of receiving or agreeing to receive payments from employers in violation of the Taft-Hartley Act (Title 29 U.S.C. §§ 186 (b) (1), 186 (d) (2)). On June 26, 1990, petitioner was sentenced to concurrent prison terms of 46 months on the racketeering conspiracy and the Taft-Hartley violations. On the racketeering conspiracy, the district court ordered petitioner to pay a fine of $105,660, including costs of imprisonment. A forfeiture, pursuant to the RICO statute, was also imposed in the amount of $88,300. The district court granted petitioner's motion to be released on bail pending appeal, finding that his appeal raised "a substantial question of law or fact likely

to result in reversal or an order for a new trial," pursuant to Title 18 U.S.C. § 3143 (b) (1).

On June 26, 1990, petitioner filed a notice of appeal to the United States Court of Appeals for the Second Circuit. In a decision dated September 3, 1991, the Court of Appeals denied petitioner's appeal and affirmed his convictions. On October 18, 1991, the Court of Appeals denied his petition for a rehearing.

Statement of Facts

(a) Introduction

Petitioner was the vice-president of the General Building Laborers Local 66 of the Laborers' International Union of North America ("Local 66"), as well as the Funds Administrator for the employee welfare benefit funds. Local 66 represents all laborers involved in building construction

in Nassau and Suffolk Counties of Long Island. The government adduced evidence at petitioner's trial that petitioner conspired with his codefendants to demand and receive money from concrete contractors. The government also adduced evidence that an organized crime family controlled Local 66 and shared in the contractors' payments. To blunt petitioner's defense that other defendants, not he, had received the payments from contractors, the government argued that petitioner was the conduit between Local 66 and the organized crime family. Thus, according to the government, paying the other defendants was the same as paying petitioner because he was collecting the money for organized crime. The linchpin for the government's argument was government exhibit 35-1, a taped conversation between petitioner and

the alleged underboss of the organized crime family, in which the sharing of payments from concrete contractors is a topic of conversation.

(b) Petitioner's Motion to Suppress

Government exhibit 35-1, also known as tape 1077, resulted from court-ordered electronic surveillance conducted by the New York State Organized Crime Task Force (OCTF). Tapes resulting from this electronic surveillance were properly judicially sealed pursuant to the requirements of state and federal law. In May 1984 and again in May 1985, however, tape 1077 was one of several tapes unsealed upon the application of OCTF to permit duplication of the original tapes for preparation of enhanced copies.

Petitioner moved to suppress tape 1077 in the district court pursuant to Title 18 U.S.C. § 2518 (8) (a),

challenging the unnecessarily lengthy four week periods in 1984 and 1985 during which the tape was unsealed. The district court concluded based upon affidavits submitted by law enforcement agents and prosecutors that tape 1077 was resealed in its original condition. It further concluded that the government had satisfactorily explained the resealing delays and denied petitioner's motion.

REASON FOR GRANTING THE WRIT

TITLE 18 U.S.C. § 2518 (8)(A) REQUIRED THE GOVERNMENT TO PROVIDE SATISFACTORY EXPLANATIONS FOR DELAYS IN RESEALING TAPE 1077 AND ITS FAILURE TO DO SO WARRANTED SUPPRESSION OF THE TAPE AT PETITIONER'S TRIAL.

The federal wiretap statute requires that tape recordings be made available for judicial sealing "[i]mmediately upon the expiration of the period of the order, or extensions thereof...." Title 18 U.S.C. § 2518 (8) (a). Tape recordings are inadmissible in evidence unless the seal "provided for by this subsection" is present or the prosecutor provides a "satisfactory explanation" for its absence. Id.

In United States v. Rios, 495 U.S. ___, 110 S.Ct. 1845 (1990), this Court emphasized that the wiretap statute requires the government to provide a "satisfactory explanation" not only for

the total absence of a seal but also for the absence of a timely applied initial seal. The Court noted that the seal "provided for by this subsection" is one obtained immediately upon expiration of the underlying surveillance order. The Court's decision leaves no doubt that the seal "provided for by this subsection" is also one that remains continuously in place. Accordingly, the government must provide a satisfactory explanation for the absence of a continuous seal or for the delay in resealing a tape.[2] As this Court also noted, the satisfactory explanation language of the statute requires the

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[2] The Court of Appeals declined to address the issue of whether the government must satisfactorily explain the delay in resealing a tape. It upheld the district court's denial of petitioner's suppression motion on the ground that, even if the statute required a satisfactory explanation under these circumstances, the government had offered satisfactory explanations for the delays in resealing tape 1077.

government to explain why the delay occurred and also why it is excusable. The Court of Appeals ruling accepting as satisfactory the government's explanations for the resealing delays conflicts with this Court's interpretation of the "satisfactory explanation" requirement as well as with its own precedent.

(a) A Satisfactory Explanation Is Required For Resealing Delays

In Rios, supra, this Court emphasized that the clear import of the "satisfactory explanation" requirement is that the government must explain the absence of the seal provided for by section 2518 (8) (a). The Court noted that one attribute of the seal provided for by the statute is that it must be obtained immediately upon expiration of the surveillance order. 110 S.Ct. at 1849. Congress' primary purpose in enacting the sealing provisions of Title III was to ensure the reliability

and integrity of electronic surveillance tapes. Id. Therefore, another attribute of the seal provided for by the statute is that, once in place, it must remain in place. As this Court observed, "Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings." Id. The Court also noted that the seal performs this function by "ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded." Id.

That Congress contemplated a continuous seal is also demonstrated by the fact that the statute does not even address the issue of unsealing tapes. Therefore, consistent with the primary purpose of the sealing provisions, the

government must provide a satisfactory explanation not only for a delayed initial sealing but also for the delay in resealing a previously unsealed tape.

The Court of Appeals for the Second Circuit in prior cases has held, consistent with petitioner's argument herein, that the sealing provisions of the wiretap statute require the government to obtain a judicial resealing of previously unsealed tapes. United States v. Long, 917 F.2d 691, 700 (2d Cir. 1990); United States v. Scopo, 861 F.2d 339, 347 (2d Cir. 1988), cert. denied, 490 U.S. 1048 (1989). In these cases, the Court of Appeals required the government to provide a satisfactory explanation pursuant to section 2518 (8) (a) for the failure to reseal. It would be totally illogical and contrary to the clear purpose of the statutory sealing provisions to require

resealing and yet not require a satisfactory explanation for the government's failure to promptly reseal.

Other courts have recognized that it would be illogical and incompatible with section 2518(8)(a) to disregard the standards relating to initial sealing delays in cases involving resealing problems. United States v. Angiulo, 847 F.2d 956 (1st Cir.), cert. denied, 488 U.S. 928 (1988). See also United States v. Vastola, 899 F.2d 211, 240 (3rd Cir.), vacated and remanded, ___ U.S. ___, 110 S.Ct. 3233 (1990)[3]; United States v.

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[3] On remand from this Court, the Third Circuit concluded that the "satisfactory explanation" requirement was inapplicable to post-unsealing situations. United States v. Vastola, 915 F.2d 865, 872 (3d Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1073 (1991). However, as one district court noted, "[I]t would be jurisprudentially myopic to hold that the Supreme Court's opinion in Ojeda Rios is limited to initial judicial sealing and precludes consideration of situations (continued...)

Riggi, 737 F.Supp. 1410, 1415 (D.N.J. 1990). These decisions implicitly recognized what this Court explicitly recognized in Rios: that the judicial seal's primary purpose is to foreclose the possibility of future alteration or tampering. United States v. Rios, supra, 110 S.Ct. at 1849. A seal that is interrupted is not a seal "provided for by [section 2518(8)(a)];" absence of the seal provided for must be satisfactorily explained.

(b) The Government Did Not Offer Satisfactory Explanations For The Resealing Delays

In United States v. Rios, supra, this Court set forth a two-prong test for assessing whether the government's reason for delaying the initial judicial sealing

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[3](...continued)
pertaining to judicial unsealing and resealing." United States v. Riggi, 737 F.Supp. 1410, 1415 (D.N.J. 1990).

of tapes constitutes a "satisfactory explanation" within the meaning of section 2518 (8) (a). The government must first explain why a delay occurred, 110 S.Ct. at 1850, or the "actual reason for the delay." 110 S.Ct. at 1852 (O'Connor, J., concurring), 1853 n.3 (Stevens, J., dissenting). Obviously, an explanation that does not account for the entire period of the delay does not satisfy this first prong. Yet, for the 1984 and 1985 resealing delays, the Court of Appeals approved of explanations that did not even purport to account for the entire period of the delays. The second prong of the "satisfactory explanation" test in Rios requires the government to explain why the delay is excusable. 110 S.Ct. at 1850. The 1984 resealing delay was not excusable because it could have been easily avoided

with a minimum of forethought and planning by the prosecutors.

The Court of Appeals accepted the government's explanation concerning the 1984 unsealing and resealing that the twenty-seven day period required to re-record eight tapes, including tape 1077, was necessitated by the fact that personnel from a tape duplication technical unit were witnesses at a trial during this period of time. As the government's affidavits submitted to the district court demonstrated, however, the technical unit was in operation from 7:00 a.m until 11:00 p.m. five days a week. Thus, the unit was in operation early in the morning prior to the time court would have been in session and late in the evening long after the trial would have been recessed for the day. The government offered nothing to rebut the defense

expert's statement in his affidavit that, even if the members of the technical unit were required as trial witnesses, nine days would have been more than sufficient time to duplicate all eight tapes rather than merely the two that had been duplicated. Therefore, the government did not explain the resealing delay for the period of time that the technical unit was in operation before and after unit personnel could have been required to appear as trial witnesses.

Furthermore, the obligations of technical unit personnel could not possibly explain the period of the resealing delay after tape 1077 had been re-recorded. The government's affidavits submitted to the district court demonstrate that tape 1077 was re-recorded on a Thursday and it was not presented to the court for resealing until the

following Tuesday afternoon. The government's explanation for this period of the resealing delay, unaddressed by the Court of Appeals, was that it was difficult to coordinate a time when the prosecutor in White Plains, the police officer, and the judge in the Bronx were all available. This justification ignores the fact that the unsealing order commanded law enforcement personnel to return the tapes to the court for resealing as soon as possible after they were re-recorded. It also ignores the fact that the police officer returned to the Bronx with the tapes immediately after they were re-recorded and presumably would have been available to comply with the court order. There is nothing in the record to suggest that the judge was unavailable and, even if he was, the resealing could have been accomplished by

another judge. United States v. Vasquez, 605 F.2d 1269, 1280 n.25 (2d Cir.), cert. denied, 440 U.S. 981 (1979). Therefore, the only explanation for this portion of the 1984 resealing delay was that the prosecutors placed their personal convenience ahead of the commands of the unsealing order and the statute.

Even if the entire twenty-seven day period that tape 1077 was unsealed was explained by the fact that technical unit personnel were required as witnesses in a trial, this explanation would still not constitute a "satisfactory explanation". Under the Court of Appeals' own precedent, sealing delays which result from a failure to institute efficient procedures, United States v. Vasquez, 605 F.2d 1269, 1280 (2d Cir.), cert. denied, 440 U.S. 981 (1979), or from a failure to plan for foreseeable non-sealing related tasks, United States

v. Massino, 784 F.2d 153, 158 (2d Cir. 1986), would not constitute a "satisfactory explanation". In this case, the delay in resealing tape 1077 was completely avoidable because the prosecutors had the flexibility of being able to coordinate the unsealing of the tape with the technical unit's schedule and insure that unit personnel would be available to accomplish the re-recording process at the time the tapes were unsealed. Accordingly, the government's explanation for the 1984 resealing delay was not a "satisfactory explanation" pursuant to section 2518 (8) (a) because it did not explain why the full extent of the delay occurred and, in any event, it was not a valid reasonable excuse.

The Court of Appeals accepted the government's explanation concerning the 1985 unsealing and resealing that the

twenty-eight day period during which eight tapes, including tape 1077, were unsealed was justified by the fact that this period of time was considerably shorter than the usual time required by the FBI lab to complete similar tasks. This statistical comparison does not constitute an explanation for the length of time that the tapes were unsealed. Plainly, if the FBI had completed duplicating the tapes in one week and had failed to inform anyone that the task had been completed for another three weeks, the FBI statistics would not excuse this unnecessary delay in returning the tapes for resealing. Missing from the government's explanation is an indication of when the FBI lab completed the duplication process. The government, then, did not provide the "actual reason" for the length of time that tape 1077 had been unsealed.

In sum, because the decision of the Court of Appeals is in conflict with this Court's recent decision in United States v. Rios and with the Court of Appeals' own precedents interpreting the "satisfactory explanation" requirement of Title 18 U.S.C. § 2518 (8) (a), this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
November 25, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 579—August Term, 1990

(Argued January 17, 1991 Decided September 3, 1991)

Docket No. 90-1416

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER VARIO, MICHAEL LABARBARA, JR., JAMES G. ABBATIELLO, and SILVESTRO SPILABOTTE,

Defendants,

PETER VARIO,

Defendant-Appellant.

Before:

OAKES, *Chief Judge*,
CARDAMONE and WALKER, *Circuit Judges*.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York (Jacob

Mishler, *Judge*), following a jury trial, convicting Peter Vario of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1962(d) and violations of the Taft-Hartley Act, 29 U.S.C. 186(b)(1).

Affirmed.

RICHARD A. FRIEDMAN, Department of Justice, Washington, DC (Andrew J. Maloney, New York, NY, United States Attorney for the Eastern District of New York, of counsel), *for Appellee*.

BRIAN D. LINDER, New York, NY (Samuel H. Dawson, Gallop Dawson, Claymon & Rosenberg, of counsel), Bruce Cutler, New York, NY, of counsel, *for Defendant-Appellant*.

WALKER, *Circuit Judge*:

Peter Vario appeals from a judgment entered in the United States District Court for the Eastern District of New York (Jacob Mishler, *Judge*), following a jury trial, convicting him of one count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1962(d) (count one), and thirteen counts of violating the Taft-Hartley Act, 29 U.S.C. 186(b)(1) (counts two through fourteen). On appeal, Vario contends that: (1) the unwarranted use of an "anonymous jury" deprived him of the presumption of innocence and

right to an impartial jury; (2) a tape was wrongly admitted into evidence in violation of 18 U.S.C. § 2518(8)(a); and (3) certain wiretap evidence should have been suppressed because amendments to the eavesdropping warrants used to obtain the evidence violated 18 U.S.C. § 2517(5). For the reasons below, we affirm the judgment of conviction.

BACKGROUND

From 1978 to 1989 Peter Vario was a leader of the General Building Laborers Local 66 of the Laborers' International Union of North America ("Local 66"). During those years, he held several different positions with Local 66, acting as an organizer, then a vice-president and later a Funds Administrator of the union's employee welfare benefits fund. Local 66, which has approximately 1200 active members, represents all laborers involved in building construction and concrete work in Nassau and Suffolk counties of New York state.

Count one of a superseding indictment issued on April 20, 1989 charged Vario, Michael LaBarbara, Jr., the business manager of Local 66, James G. Abbatiello, the assistant business manager of Local 66, and Silvestro Spilabotte, the owner of a concrete company, with conspiracy to conduct the affairs of Local 66 through a pattern of racketeering activity in violation of 18 U.S.C. 1962(d). The indictment charged that Vario and the others had committed sixty-nine acts of racketeering in furtherance of the conspiracy, including the solicitation and receipt of payoffs from contractors in violation of the Taft-Hartley Act, 29 U.S.C. 186, and one act of obstruction of justice. Counts two through fourteen of the indictment alleged that the defendants had received money from

concrete contractors in violation of the Taft-Hartley Act, 29 U.S.C. 186.

Prior to trial, Vario's co-defendants pled guilty. Vario's trial centered on allegations that he and others had engaged in a scheme to extort money from concrete contractors. In return for these payments, concrete contractors were permitted to violate prevailing collective bargaining agreements. Resistance to payment demands was met by economic reprisals from the union and other union-controlled entities, including concrete suppliers. There was also evidence at trial that Vario was a member of the Lucchese organized crime family and that high-ranking members of the Lucchese group furthered Vario's extortion scheme by settling disputes that arose under the scheme and shared in the scheme's payoffs.

The jury found Vario guilty on all counts and found $88,300 forfeitable. Judge Mishler sentenced him to concurrent terms of imprisonment of 46 months on each of the fourteen counts, ordered the $88,300 forfeited, imposed a fine of $50,000, an assessment of the cost of imprisonment and a three year term of supervised release. This appeal followed.

DISCUSSION

I. *Anonymous Jury*

During a pre-trial status conference, the district court suggested that it might be appropriate to conceal the jurors' identities in light of the obstruction of justice charge, which involved a conversation between co-conspirator Abbatiello and a grand jury witness. The government followed with a motion to that effect. The district court granted the government's motion to empanel an

"anonymous jury"—one in which jurors did not reveal their names, addresses, or places of work to the parties or counsel.

Vario's primary contention on appeal is that the use of an anonymous jury infringed his due process right to a fair trial and his Sixth Amendment right to an impartial jury by depriving him of the presumption of innocence and impairing his effective exercise of peremptory challenges. We reject this argument.

We have had several occasions in recent years to consider the issue of "anonymous juries." In a line of decisions, we have held that when genuinely called for and when properly used, anonymous juries do not infringe a defendant's constitutional rights. *See, e.g., United States v. Tutino*, 883 F.2d 1125 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1139 (1990); *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988); *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 841 (1985); *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985); *United States v. Barnes*, 604 F.2d 121 (2d cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

In *United States v. Thomas*, 757 F.2d 1359, 1365 (2d Cir. 1985), we outlined the basic standard for determining when the use of an anonymous jury is constitutional: "there must be, first, strong reason to believe that the jury needs protection and, second, reasonable precaution must be taken to minimize the effect that such a decision might have on the jurors' opinions of the defendants." Vario's principal challenge focuses on the first of these requirements. We review his claim bearing in mind that the empaneling of an anonymous jury and its potential impact on the constitutionality of a trial must "receive close judi-

cial scrutiny and be evaluated in the light of reason, principle and common sense." *Id.* at 1363.

A. Was the use of an anonymous jury warranted in this case?

In the district court, the government argued that three factors warranted the use of an anonymous jury in this case. First, it argued that Vario was a member of the Lucchese organized crime family and that recent events in another organized crime trial showed the sensitivity of jurors to intimidation by organized crime. Second, it noted that Vario's co-conspirator had used grand-jury tampering as one method of furthering the RICO conspiracy, and finally, it contended that the jurors would be intimidated by publicity surrounding the case. Judge Mishler explicitly relied on the first two of these reasons in his decision to empanel an anonymous jury. He remarked that the government had offered proof that Vario was a member of the Lucchese family and that this family, through Vario, participated in the affairs of Local 66. Judge Mishler then reasoned that "[t]he recent experience of jury tampering in the case of *United States v. Gotti*," an unrelated organized crime trial, coupled with the obstruction of justice charge against one of the co-conspirators, called for an anonymous jury.

We are satisfied that two circumstances surrounding this case, the grand jury tampering charge and the expected publicity, justified the trial court's decision to empanel an anonymous jury. However, as we will explain below, we reject the trial court's reasoning insofar as it relied on Vario's organized crime connections.

Vario contends that we should not accord any weight to the obstruction of justice incident both because it was his

co-conspirator Abbatiello, not Vario, who actually approached a grand jury witness and because the grand jury witness was Abbatiello's friend. We reject both arguments.

An obstruction of justice charge, particularly one involving jury tampering, has always been a crucial factor in our decisions regarding anonymous juries. *See, e.g., United States v. Tutino*, 883 F.2d 1125, 1132-33 (2d Cir. 1989) (history of jury tampering attempt when coupled with defendant's serious criminal records, was sufficient to justify the empaneling of an anonymous jury); *Thomas*, 757 F.2d at 1365 (justifying anonymous jury because of "strong evidence of defendants' past attempts to interfere with the judicial process, and [because] defendants were alleged to be part of a group that possessed the means to harm jurors").

Although Vario may not have personally spoken to the grand jury witness, his co-conspirator took the act in furtherance of the conspiracy. Since it is a fundamental tenet of the law of conspiracy that reasonably foreseeable acts of individual co-conspirators taken in furtherance of the conspiracy count against all members equally, Vario's argument is unavailing. *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Bruno*, 873 F.2d 555, 560 (2d Cir.), *cert. denied*, 110 S.Ct. 125 (1989). We find irrelevant Vario's further contention that we should somehow disregard this incident because of the prior relationship between the grand jury witness and Abbatiello. Rather, this event demonstrated the willingness of the conspirators to tamper with the judicial process.

Vario also argues that the publicity surrounding this case was so minimal that it did not warrant an anonymous jury. We are unpersuaded. Pre-trial publicity may militate

in favor of an anonymous jury because it can "enhance the possibility that jurors' names would become public and thus expose them to intimidation by defendants' friends or enemies, or harassment by the public." *United States v. Persico*, 621 F.Supp. 842, 878 (S.D.N.Y. 1985). At the time of the government's anonymous jury motion in the district court, *New York Newsday* had recently published a cover story about the case entitled *The Mob and Local 66*. The story detailed the extensive nature of the conspiracy charged which was said to affect virtually all of the construction industry on Long Island. Although no publicity followed this initial article, we cannot say that at the time that the anonymous jury motion was made, the government's prediction that publicity would continue was unreasonable or unjustified. While later developments may have proved this prediction wrong, we cannot say, viewing the situation as it was then presented to the trial judge, that there were insufficient grounds to believe that this case warranted the use of an anonymous jury. *See United States v. Persico*, 832 F.2d at 717 (2d Cir. 1987) (" 'extensive publicity this case is *expected* to continue to attract' " supported use of anonymous jury) (emphasis supplied); *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979) ("in a case that generated as much pretrial publicity as this one did and in which allegations of dangerous and unscrupulous conduct abounded," anonymous jury served valid purpose).

Although we find that the district court did not err in deciding that the circumstances of this case warranted an anonymous jury, the additional reason that the district court gave to justify its decision was erroneous. If it had been the sole reason advanced, a reversal would have been in order. Specifically, the district court noted the government's evidence linking Vario to the Lucchese

crime family, and stated that "[t]he recent experience of jury tampering in the case of *United States v. Gotti*," an unrelated organized crime trial, was a factor warranting an anonymous jury.

The invocation of the words "organized crime," "mob," or "Mafia," unless there is something more, does not warrant an anonymous jury. This "something more" can be a demonstrable history or likelihood of obstruction of justice on the part of the defendant or others acting on his behalf or a showing that trial evidence will depict a pattern of violence by the defendants and his associates such as would cause a juror to reasonably fear for his own safety. Such proof would be sufficient in and of itself in an appropriate case to warrant an anonymous jury regardless of whether the defendant was a reputed mobster or associated with a recognized organized crime family.

To be sure, the specter of organized crime has played into our previous decisions to uphold the use of anonymous juries, but in these decisions, it was the reasonable likelihood of juror intimidation, not the incantation of the words "the mob" or "organized crime," that prompted the anonymous jury. *See United States v. Tutino*, 883 F.2d 1125, 1132-1133 (2d Cir. 1989) (defendants' serious criminal records and history of jury tampering); *United States v. Persico*, 832 F.2d 705, 717 (2d Cir. 1987) (" 'violent acts alleged to have been committed in the normal course of Colombo Family business' "); *United States v. Thomas*, 757 F.2d 1359, 1364 (2d Cir. 1985) (history of violence —"mob-style" killings—bore directly on the issue of juror safety or fear of reprisal).

In this case, we find that the district court erred insofar as it simply referred to another Mafia trial as support for its decision. Although evidence about the role of orga-

nized crime in the payoff scheme was certain to be relevant at Vario's trial, the essence of the government's case was that the scheme was enforced by economic reprisals, not intimidating acts such as would bear on the issue of juror safety or fear. The district court made no findings that demonstrated Vario's organized crime connection to be directly relevant to the issue of an anonymous jury. Consequently, the district court's reference to another organized crime trial as evidence that Vario's connection to the Lucchese crime family would intimidate jurors was neither logical nor relevant. Before a district judge may rely on the organized crime connection of a defendant as a factor in the question of anonymous juries, he must make a determination that this connection has some direct relevance to the question of juror fears or safety in the trial at hand, beyond the innuendo that this connection conjures up. In this case, although we find that the district court erroneously relied on Vario's organized crime connection as a basis for its decision to empanel an anonymous jury, we nonetheless affirm the decision based on the other grounds discussed above.

B. Did the Use of the Anonymous Jury Prejudice Vario's Peremptory Challenges or Burden His Presumption of Innocence?

Vario contends that even if this case warranted the empaneling of an anonymous jury, the court took insufficient precautions to safeguard his presumption of innocence and his right to a fair and impartial jury through the meaningful exercise of peremptory challenges. These arguments are without merit.

Although the district judge here did not instruct the jury in order to explain their anonymity, there is no reason to believe that the absence of instructions led the jurors to

conclude other than that "[i]t is a common practice" to keep jurors' names and identities in confidence, an instruction we approved when given explicitly in *United States v. Tutino*, 883 F.2d 1125, 1133 (2d Cir. 1989). Furthermore, Vario did not object to the court's charge to the jury and therefore waived his right to explicit instructions. In any event, the district court fully instructed the jurors on the presumption of innocence.

In addition, the district court conducted a searching *voir dire* which sufficiently enabled Vario to exercise his challenges meaningfully and to obtain a fair and impartial jury. *See id.* at 1133. As we explained in *United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979), "[a]s long as a defendant's substantial rights are protected by a *voir dire* designed to uncover bias as to issues in the cases and as to the defendant himself, then reasonable limitations on the questioning should not be disturbed on appeal."

II. *Admissibility of Surveillance Tape*

Vario contends that the government unduly delayed in resealing an electronic surveillance tape, tape 1077, the two times it was handed to the government under court order for duplication and enhancement, and that the government failed to satisfactorily explain such delay in violation of 18 U.S.C. § 2518(8)(a) of the Omnibus Crime Control and Safe Streets Act which governs the procedures for the initial sealing, storage and duplication of oral, wire and electronic surveillance evidence. We disagree.

On May 15, 1984 and again on May 23, 1985, pursuant to procedures under 18 U.S.C. § 2518(8)(a), New York State Supreme Court Justice Burton Roberts authorized the duplication and enhancement of certain tape record-

ings made pursuant to a surveillance order. One of these was the tape at issue here, tape 1077, which records a July 1, 1983 conversation between Vario and another man during which Vario discussed a $21,000 payoff. After being unsealed pursuant to Justice Roberts' May 15 order, tape 1077 was judicially resealed along with other tapes on June 11, 1984. Tape 1077 was unsealed again pursuant to the May 23, 1985 order, and judicially resealed by Justice Roberts on June 20, 1985. Both duplication orders issued by the judge provided *inter alia* that "as soon as possible [after duplication] the original tapes are to be returned to the Court for resealing." Vario moved to suppress the tapes, contending that it took the government approximately 28 days each time to process the tapes and that it failed to satisfactorily explain the delay. The district court found that after both unsealings, tape 1077 was resealed in its original condition and was not subject to any tampering. It further found that the government had satisfactorily explained any delay. The district court therefore denied Vario's motion to suppress. We cannot fault the district court's decision.

Section 2518(8)(a) provides *inter alia*: "[i]mmediately upon the expiration of the period of the [surveillance] order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." The section further provides that "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom . . . ." *Id.*

The Supreme Court recently considered § 2518(8)(a) in *United States v. Ojeda Rios*, 110 S.Ct. 1845 (1990). Noting that Congress passed this section in order to ensure

the reliability and integrity of evidence obtained by means of electronic surveillance, the Court determined that § 2518(8)(a) applies to cases where the government has delayed in initially sealing recordings as well as to cases where no seal was ever applied to a recording. Where the section does apply, *Rios* further held that the government must offer a "satisfactory explanation" why a delay occurred and why it is excusable.

Vario argues that *Rios* applies not only to the initial sealing of tapes but also to the unsealing and *re*-sealing of tapes for duplicating purposes after they have come under judicial control pursuant to § 2518(8)(a). He argues that § 2518(8)(a) mandates that any post-unsealing use of wiretap evidence capable of compromising its physical integrity must be satisfactorily explained before it can be used in evidence.

We need not reach this question, however, because we note that even if we were to adopt Vario's construction of § 2518(8)(a), the district court made an express finding, supported by the record, that the government had satisfactorily explained the delays involved here. There was ample evidence that entitled the district court to reach this conclusion: during the 1983 unsealing the technical staff responsible for duplication had been witnesses in other trials; the government also presented evidence that the duration of unsealing was considerably shorter than the usual time required by the FBI lab to accomplish the task, given the backlog of requests. Of course, regardless of whether § 2518(8)(a) applies to resealing delays, if unsealing or resealing had compromised the integrity or reliability of a tape, suppression would result. *United States v. Long*, 917 F.2d 691, 700 (2d Cir. 1990); *United States v. Angiulo*, 847 F.2d 956, 978 (1st Cir. 1988). However, the district court made a finding, unchallenged on

appeal, that the tapes had not been tampered with and were returned in their original condition. Accordingly, the tapes were properly received in evidence.

III. *Amendments to Eavesdropping Warrants*

Vario argues that the government's applications to amend certain eavesdropping warrants to include certain conversations not relating to offenses cited in the original warrant violated 18 U.S.C. § 2517(5) and New York Criminal Procedure Law § 700.65(4) because they were not submitted as soon as practicable and because they did not adequately convey underlying facts and that evidence obtained pursuant to the warrants should have been suppressed. We disagree.

Section 2517(5) governs the disclosure of information obtained by lawfully authorized electronic surveillance. It provides that when a conversation is intercepted "relating to offenses other than those specified in the order of authorization or approval, the contents thereof" may be disclosed in federal proceedings when such disclosure is "authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable." The purpose underlying this section is to ensure that "the original order . . . was sought in good faith and not as [a] subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." S. Rep. No. 1097, 90th Cong., 2d Sess. 12, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2189. New York Criminal Procedure Law § 700.65(4) also has an "as soon as practicable" requirement.

Vario argues that the government did not submit applications "as soon as practicable" to use in evidence two groups of tapes, the "Sant'Oro" and "Avellino" tapes. Both sets of tapes resulted from a New York State Organized Crime Task Force (OCTF) investigation of the Long Island private carting industry. The OCTF later shared the tapes intercepted during this surveillance with federal authorities, who in turn procured amendments to the original eavesdropping warrants in order to use the tapes as evidence in this case.

We find that the district court did not err in determining that the government's applications to amend were filed "as soon as practicable" for purposes of § 2517(5). The "as soon as practicable" requirement of § 2517(5) should be construed "in a common sense fashion," *United States v. Marion*, 535 F.2d 697, 707 (2d Cir. 1976). Here, while the government possessed the Sant'Oro tapes for four years, it became aware of their relevance to the instant case seven months prior to the government's application to amend, as Vario concedes in his reply brief. Vario does not assert a delay greater than seven months with respect to the Avellino brief. Comparable delays under factually similar circumstances have been upheld on appeal. *United States v. Van Horn*, 789 F.2d 1492 (11th Cir. 1986) (22 month total delay, 5 months from when federal law enforcement learned of wiretap); *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 823 (1983) (19 month delay).

Here, the parties dispute the extent of the delay. Vario submits that the government delayed for seven months before filing an application to use the Avellino tapes and that the Sant'Oro application delay "might be calculated at anywhere from seven months to four years." However, the government argues that although it had access to the

Sant'Oro tapes for several years, the relevance of the tapes to its investigation of Local 66 became clear much later, only seven months before it applied for the amendment to the original eavesdropping order. It was then that newly developed witnesses appeared who explained key events under discussion on the tape recordings. In his reply brief, Vario argues only that "the government's application was submitted approximately seven months after it was practicable to do so," and thus appears to concede that the delay was in fact seven months. We do not think the district court erred in determining that this delay conformed with the "as soon as practicable" requirement, particularly where Vario does not allege any prejudice from the delay or that the state wiretap was a subterfuge to generate evidence for federal charges. *See United States v. Van Horn*, 789 F.2d 1492, 1504 (11th Cir. 1986) (test for what constitutes excessive delay under § 2517(5) depends not only on length of delay, but also on whether delay implicated statutory policy to prevent subterfuge); *see also Southard*, 700 F.2d at 30 (approving 19 month delay where government explained hiatus by stating that conversations' relevance "has only become apparent upon a recent analysis").

We also reject Vario's contention that the government applications must satisfy the requirements of New York Criminal Procedure Law § 700.65(4) in addition to the requirements of 18 U.S.C. 2517(5). Both the federal and state statute use the same "as soon as practicable" language. Vario asserts, however, that the New York cases have interpreted the "as soon as practicable" requirement more strictly than the federal courts have interpreted the identical federal statutory language. We need not decided that issue, however, because in *United States v.*

Sotomayor, 592 F.2d 1219, 1225 (2d Cir. 1979), we stated that

> in determining whether to admit a wiretap obtained by a state officer acting under a state court order issued pursuant to a state statute, . . . [federal courts need] apply only those more stringent state statutory requirements or standards that are designed to protect an individual's right of privacy, as distinguished from procedural rules that are essentially evidentiary in character.

Sotomayor thus set up a distinction between procedures governing the interception of wiretap evidence and those post-interception procedures that relate to the preservation of such evidence.

Since both the Federal Act and New York Criminal Procedure Law § 700.65(4) govern the disclosure of already intercepted communications, these requirements are procedural rules "essentially evidentiary in character." *Sotomayor*, 592 F.2d at 1225-26. Since a government delay in applying to use communications in evidence under these rules does not bear on a defendant's privacy rights, *Sotomayor* does not require the application of state law to the question of such delay, and we need not consider whether the government's applications complied with New York law.

Finally, we reject Vario's argument that the government's amendment applications failed to specify adequate facts relating to the federal offense.

Affirmed.

United States Court Of Appeals

For The

Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York on the 18th day of October, one thousand nine hundred and ninety-one.

UNITED STATES OF AMERICA,

Appellee,

v. DOCKET NUMBER

PETER VARIO, 90-1416

Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant,

PETER VARIO

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH

Clerk

Title 18 U.S.C. § 2518

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recording shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use

or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.